IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 24, 2007

STATE OF TENNESSEE v. TONYA LEA CHANDLEY[1]

Direct Appeal from the Criminal Court for Knox County
No. 85113B Richard R. Baumgartner, Judge

No. E2006-02366-CCA-R3-CD - Filed November 15, 2007

In this appeal by the State, a Knox County Grand Jury returned a presentment against the Defendant, Tonya Lea Chandley, charging her with two counts of aggravated robbery. The presentment was returned by the grand jury during the pendency of the Defendant's preliminary hearing in Knox County General Sessions Court on a warrant for the same two aggravated robbery charges. The Defendant filed a motion to dismiss the presentment and remand the case to General Sessions Court for a preliminary hearing. The Defendant alleged that she had effectively been denied a preliminary hearing by the issuance of the presentment. The trial court, interpreting Rule 5(e) of the Tennessee Rules of Criminal Procedure, granted the Defendant's motion. The State filed this appeal contending that the motion was improperly granted. Because we conclude that Rule 5(e) of the Tennessee Rules of Criminal Procedure does not afford the Defendant a remedy in cases in which a presentment is returned prior to preliminary hearing, we reverse the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. MCLIN and D. KELLY THOMAS JR., JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Randall E. Nichols, District Attorney General; Ta Kisha M. Fitzgerald, Assistant District Attorney General, for the Appellant, State of Tennessee.

Mark E. Stevens, District Public Defender; and Christy Murray, Assistant Public Defender, Knoxville, Tennessee, for the Appellee, Tonya Lea Chandley.

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[1]The record indicates that the presentment incorrectly identifies the Defendant's name as being spelled "Chanley" when it is in fact "Chandley".

OPINION
I. Facts

In this appeal, the State contends that the trial court erred when it dismissed the presentment against the Defendant and remanded the Defendant's case to General Sessions Court for a preliminary hearing. In the Defendant's motion to remand, and at the hearing on that motion, the Defendant alleged that the State presented the case to the grand jury while the case was still pending in General Sessions Court and that the State acted in bad faith when so doing. Therefore, the Defendant alleged, Rule 5(e) of the Tennessee Rules of Criminal Procedure mandated that the presentment be dismissed and that the case be remanded to General Sessions Court for a preliminary hearing. The trial court agreed, dismissed the presentment, and remanded the case to General Sessions Court.

The following facts are evinced in the motions filed by the parties in the trial court: The Defendant's case originated in the Knox County General Sessions Court on arrest warrants for aggravated robbery, theft, and public intoxication. The warrants were set to be heard on May 10, 2006. The case was moved to May 18, 2006, to ensure that both the Defendant and her co-defendant had the same court date. On May 18, 2006, the co-defendant's counsel requested a continuance. The Assistant District Attorney ("ADA") also requested a continuance so that both defendants could be tried together. The State's witnesses were not present at this court date, and the case was reset for June 2, 2006.

On June 2, 2006, co-defendant's counsel again requested a continuance, and the State's witnesses were not present. The Defendant's bonds were reduced, and the case was continued until July 11, 2006.

On July 11, 2006, the victim and the State were present in court and prepared for trial, and neither the Defendant nor her co-defendant appeared. The State's witnesses were present and prepared for a preliminary hearing. The Defendant's counsel learned that the Defendant was not present for court because she was in custody in Greene County. The Defendant's counsel requested that the Defendant be transferred from Greene County to Knox County, and the case was reset for August 8, 2006.

On August 8, 2006, the Defendant's counsel and the ADA selected a hearing date of August 29, 2006. Between August 8 and August 29, a different ADA presented the Defendant's case charging aggravated robbery to the grand jury without the Defendant's knowledge. A presentment against the Defendant was returned on August 15, 2006, on the same two counts of aggravated robbery that were pending the August 29, 2006, preliminary hearing in General Sessions Court. On August 25, 2006, in Criminal Court, the Defendant was found indigent and appointed counsel. The Criminal Court case was continued until September 2006.

On September 25, 2006, the Defendant filed a motion to dismiss the presentment and remand the case to General Sessions Court for a preliminary hearing. In that motion she alleged

that she was present and prepared for trial at every court date except the one when she was in custody. Further, the Defendant averred that the State either agreed to or requested each of the continuances. Finally, she alleged that the State's witnesses in this case did not appear at any of the court dates, and the subpoena for the complaining witness was returned due to "insufficient address." She alleged that she had been deprived of her right to a preliminary hearing through no action of her own and to allow the case to continue in Criminal Court would deprive her of her right to a preliminary hearing.

The State countered in its response that it was present, as were its witnesses, and prepared for a preliminary hearing on July 11, 2006. Further, it asserted that the Defendant, who had been arrested in Greene County for public intoxication, criminal impersonation, and violation of probation on July 30, 2006, never called her attorney and asked to be transported to Knox County for her preliminary hearing. Therefore, the State asserts that it did not act in bad faith, and the Defendant is not entitled to have the case remanded for a preliminary hearing.

The trial court granted the Defendant's motion dismissing the presentment and remanding the case to General Sessions Court for a preliminary hearing, and this appeal by the State followed.

II. Analysis

This case hinges on an interpretation of Rule 5(e) of the Tennessee Rules of Criminal Procedure and on the distinction between an indictment and a presentment.

A. History

A brief discussion of the history of indictments and presentments is, thus, necessary. As first explained in *Garret v. State*, 17 Tenn. (9 Yer.) 389, 389-90 (Tenn. 1836):

> [T]he act of 1824, ch. 5, sec. 2, gives the grand jurors of the state very extensive inquisitorial powers, making it their duty to enquire diligently after all such [gaming] offenders, and giving them the power to call all persons for examination before them whom they may believe to have any knowledge of the commission of such [gaming] offences. The design of this statute certainly was to enable the jury, upon acquiring the necessary information, to present the offenders in the same way as if they themselves personally knew them to be guilty. In England the practice is, when the grand jury or a portion of their body are cognizant of an offence, to return a presentment thereof into court, upon which the attorney general frames a bill of indictment; but in this state the practice has not been to frame a bill of indictment upon the presentment, but to put the prisoner upon trial on the presentment, which is in the form of an indictment, except that, instead of being signed by the attorney general and foreman of the grand jury, it is signed by the grand jurors themselves individually, and this practice has been recognized by

our courts.

See also, *e.g.*, *State v. Darnal*, 20 Tenn. (1 Humph.) 290, 290-94 (Tenn. 1839) (discussion of historical difference in prosecution of a political candidate for providing "spiritous liquors" to an elector for the purpose of obtaining votes). Thus, historically the grand jury was limited to the independent prosecution via presentment of offenses based upon two sources of information: (1) any offense personally observed by its members – because at common law the grand jury had no inquisitorial power, *State v. Wilson*, 91 S.W. 195, 197 (Tenn. 1906); or (2) any offense specifically sanctioned by statute to be inquired upon through independent witnesses without any initiative of the district attorney. Any offense not personally observed by a member, or statutorily sanctioned to be inquired upon, would have to be pursued via indictment through the initiative of the district attorney.

In *Davidson*, our supreme court discussed the nature of an indictment:

> An indictment is a formal written accusation, charging one or more persons with a crime, drawn up and submitted to a grand jury by the public prosecuting attorney, investigated and adopted by that body, and presented upon oath by them to the court. No bill of indictment may be sent to the grand jury in this State without the sanction and approbation of the Attorney General proved by his signature on some part of the indictment.

State v. Davidson, 103 S.W.2d 22, 23 (Tenn. 1937) (citations omitted). In discussing the nature of a presentment historically, the *Davidson* court referred to it's opinion in *Darnal*, which stated:

> The presentment is in the form of a bill of indictment, and is signed individually by the grand jurors who returned it. In England, as we have had occasion heretofore to observe, an offender never was put upon trial upon a presentment, but on a return of a presentment by the grand jury, which was merely an informal information of the offence having been committed, the attorney general prepared a bill of indictment thereon, stating an offence in legal and technical form, and upon this the person charged was put upon his trial. Such has not been the practice in the State of Tennessee. Here, when the grand jury is cognizant of an offence, the practice is to inform the attorney general in the first instance, who prepares a bill of indictment upon the information, which is delivered to the grand jury and is by them returned, instead of the old informal presentment; the consequence is that the only difference between a presentment thus made and a bill of indictment is, that the presentment is signed by all the jurors and the bill of indictment is signed only by the foreman.

Darnal, 20 Tenn. (1 Humph.) at 292.

Much of the case law regarding presentments during the nineteenth century dealt with

whether or not a statute subjected a particular offense to the broad inquisitorial power of the grand jury. *See*, *e.g.*, *Wilson*, 91 S.W. at 199 (perjury prosecution could not proceed by presentment because statute at the time of offense had not conferred inquisitorial power upon the grand jury to investigate that offense). However, by 1932, the Code of 1932 dispensed with inquisitorial power conferred upon the grand jury only in specific offenses and gave way to the general inquisitorial power that allows the grand jury to subpoena witnesses and to investigate the commission of any criminal offense upon its own initiative. *Davidson*, 103 S.W.2d at 24. This change muddied the distinction between an indictment and a presentment to the point that most twentieth century jurisprudence only dealt with whether a particular charging instrument was indeed a presentment (as indicated by the signatures of all grand jurors) or was instead an indictment (as indicated by the signatures of the district attorney and grand jury foreperson).

The manner in which the charging instrument was initiated became of no consequence and the terms grew to be used interchangeably. The charging instruments became distinguished only by the signatures on the document. *State v. Mingledorff*, 713 S.W.2d 88, 89 (Tenn. 1986) (no requirement that charging instrument state it is an indictment because its form distinguishes it from a presentment with twelve signatures and, "[o]therwise, the words are interchangeable"). At times, even the manner of endorsement was of no consequence. *Stoots v. State*, 325 S.W.2d 532 (Tenn. 1959) (sufficient presentment *where district attorney prepared and signed the presentment*, the grand jury selected a secretary to sign each grand jurors name to the presentment in the presence of the other grand jurors and the grand jurors then voted upon whether to return the presentment) (emphasis added). In *Stoots*, our supreme court further noted that:

> [o]ur investigation of the authorities show that in the overwhelming majority of jurisdictions presentments are no longer a part of the machinery for indicting one for a crime. Tennessee though is an exception and still has the presentment as part of such machinery. It is provided in Section 40-1702, T.C.A., that where the word indictment is used in this State it shall likewise include presentment.

Id. at 536.

B. Indictment versus Presentment and Rule 5(e)

Rule 5(e) provides guidance on preliminary hearings:

> Any defendant arrested prior to *indictment or presentment* for any offense . . . shall be entitled to a preliminary hearing upon his request therefor, whether the grand jury of the county be in session or not. If the defendant is *indicted* during the period of time in which his preliminary hearing is being continued, or at any time before the accused has been afforded a preliminary hearing on a warrant, whether at his own request or that of the prosecutor, the defendant may dismiss the *indictment* upon motion to the court. Provided, however, that no such Motion

> to Dismiss shall be granted after the expiration of thirty days from the date of defendant's arrest. (Emphasis added.)

The State asserts in part that Rule 5(e) does not apply to presentments and that a presentment cannot be dismissed for any reason when a criminal defendant is denied a preliminary hearing, even if the presentment is returned during the pendency of the preliminary hearing. The Defendant counters that a presentment and indictment should be treated the same for purposes of Rule 5(e) and that a presentment, like an indictment, can be dismissed if a defendant is denied a preliminary hearing.

Tennessee law is clear that, while a preliminary hearing is not constitutionally required, it is a critical stage of a criminal prosecution mandated by law. *Moore v. State*, 578 S.W.2d 78, 80 (Tenn. 1979); *State v. Whaley*, 51 S.W.3d 568, 570 (Tenn. Crim. App. 2000). The primary function of a preliminary hearing is to determine whether probable cause exists to believe that the accused committed the offense charged, and to fix the amount of bail for bailable offenses. Tenn. R. Crim. P. 5.1; *Whaley*, 51 S.W.3d at 570; *State v. D'Anna*, 506 S.W.2d 200, 203 (Tenn. Crim. App. 1973).

In *Moore*, the Tennessee Supreme Court created an exception to the thirty-day limitation in the last sentence of Rule 5(e), holding that:

> [T]he thirty-day limitation . . . is applicable only when all parties--including the defendant, who must act promptly--have acted in good faith and in compliance with the statute. The failure of the court or the prosecution to exercise good faith and to abide the law operates to toll the statute and preclude its invocation.

Moore, 578 S.W.2d at 82. Thus, "[g]enerally, the State may seek an indictment by the grand jury subsequent to a dismissal of a warrant and prior to a preliminary hearing, and the indictment starts a new proceeding." *Whaley*, 51 S.W.3d at 570-71 (citing *Waugh v. State*, 564 S.W.2d 654, 660 (Tenn. 1978)). The State is, however, precluded from pursuing a grand jury indictment when it, "'acting in bad faith, effectively denies the accused a preliminary hearing.'" *Id.* (quoting *State v. Golden*, 941 S.W.2d 905, 908 (Tenn. Crim. App. 1996)).

In *Whaley*, this Court applied the "bad faith" analysis to a presentment. The Court noted, however:

> The state does not argue that a different standard should apply to a presentment than to an indictment. Nor is there any evidence as to the role played by the district attorney general with regard to this presentment, although the presentment does bear the signature of the district attorney general as well as all grand jurors. We will apply the "bad faith" analysis to this presentment.

Whaley, 51 S.W.3d at 571. In an accompanying footnote, the Court added:

> [T]he first part of Tenn. R. Crim. P. 5(e) requires a preliminary hearing for a defendant arrested "prior to indictment *or presentment*." The second part authorizes dismissal of "the indictment" when a defendant has been denied the right to a preliminary hearing. Dismissal of a "presentment" is not mentioned in the second part. Both parties assume that a presentment is to be treated the same as an indictment under Tenn. R. Crim. P. 5(e). It is arguable that the "independent inquisitorial power of the grand jury," as "derived directly from Article I, Section 14, of the Tennessee Constitution," requires that presentments be treated differently. *See State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994). For the purposes of this appeal, however, we do not address whether a presentment should be treated differently than an indictment.

The issue that this Court previously identified in the footnote is now the one squarely before us in this appeal. The State, aware of the *Whaley* decision, argues that Rule 5(e) does not apply to presentments and that a presentment cannot be dismissed for any reason when a criminal defendant is denied a preliminary hearing, even if the presentment is returned during the pendency of the preliminary hearing.

In considering this issue, we begin with the long-standing principle "that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment." Tenn. Const. art. I, § 14. Although the most common method of initiating prosecution is an indictment, Tennessee law, as noted above, also allows for prosecution to commence by a presentment. *See State v. Street*, 768 S.W.2d 703, 713 (Tenn. Crim. App. 1988); David Louis Raybin, 9 Tenn. Prac., Crim. Prac. & Procedure, § 9.2 (2007). Today, indictments and presentments are virtually identical in purpose. The general purpose of either instrument is to advise the accused of the offense with which he or she is charged. *See, e.g., Stanley v. State*, 104 S.W.2d 819, 821 (Tenn. 1937). The form of a presentment is often, by practice, sufficiently similar to the form of an indictment that the Tennessee code states that the use of indictment includes presentment "whenever the context so requires or will permit." T.C.A. § 40-13-101(b) (2006).

While, in practice, a presentment and an indictment are similar, a presentment, as stated before, is derived from directly from article I, section 14, of the Tennessee Constitution, which provides "[t]hat no person shall be put to answer any criminal charge but by presentment, indictment or impeachment." The grand jury has "inquisitorial powers over and shall have authority to return a presentment of all indictable or presentable offenses found to have been committed or to be triable within the county." Tenn. R. Crim. P. 6(d). "That power enables the grand jury to act independently of a court and the district attorney by instituting a criminal action by virtue of a presentment." *Superior Oil, Inc.*, 875 S.W.2d at 661.

Thus, the question is, does Rule 5(e) allow for dismissal of a presentment obtained during a continuance when the State acts in bad faith? We conclude that to read Rule 5(e) to

allow the dismissal of a "presentment" would be to, in some circumstances, impermissibly infringe upon the power of the grand jury, thus, we answer that question in the negative. By way of example, we can conceive of a situation where a defendant's case is in general sessions court on an arrest warrant, and the district attorney, acting in bad faith, continues the case. Acting independently of the district attorney, and unaware that the case is before the general session court, the grand jury finds that there is probable cause and issues a presentment, and the case is then before the circuit or criminal court. Were we to read Rule 5(e) to allow the dismissal of a presentment, the defendant could file a motion in the circuit or criminal court to dismiss the presentment based upon the district attorney's bad faith. Quite clearly, in the situation described above, the district attorney's bad faith is wholly irrelevant to the grand jury's presentment. Therefore, reading Rule 5(e) this way would unconstitutionally infringe upon the grand jury's function. *See Superior Oil, Inc.*, 875 S.W.2d at 661.

As further support for our holding, we note that a plain reading of the Rule 5(e) evinces that the word "presentment" is clearly missing from the second sentence. The "'well-established and well-known rules of construction' which courts apply when interpreting statutes enacted by legislative bodies also apply when court interpret rules of procedure." *State v. Crowe*, 168 S.W.3d 731, 744 (Tenn. 2005) (citing *Doe v. Bd. of Prof'l Resp. of S. Ct. of Tenn.*, 104 S.W.3d 465, 469 (Tenn. 2003)). Thus, the rule must be afforded an interpretation that "does not unduly restrict or expand its coverage beyond its intended scope. We apply the natural and ordinary meaning of the language as it is used in the context and construe together all sections of the rule in light of its general purpose and plan." *Id.* (citations omitted). Viewing the rule in this light, it seems clear that the drafters of this rule purposefully omitted the word "presentment" from the second section of the rule, presumably in an attempt to preserve the grand jury's independent inquisitorial powers.

We recognize that the situation described above does not appear to be in concert with the facts in this case. The presentment contains all the signatures of the grand jurors and the grand jury foreman on the first page, and the district attorney on the second page. The district attorney's signature provides evidence that the State played some role in securing this presentment, but, to what extent, we do not know.

Unfortunately, this ruling could lend itself to abuse by unscrupulous prosecutors. For example, a prosecutor, aware of this case, might choose to pursue a presentment rather than an indictment simply in order to avoid dismissal. Such an unfortunate situation may be inevitable with the current wording of Rule 5(e) and the constitutional rights of a grand jury.

We note that perhaps a better rule would be that a presentment could be dismissed pursuant to Rule 5(e) where the proof showed that the district attorney sought the presentment from the grand jury and the grand jury did not, in fact, rely upon its independent inquisitorial power in issuing the presentment. However, in our view, the current version of Rule 5(e) does not allow for such an interpretation, and we are unsure how such a rule would operate in practice in that it is unclear how a defendant might present evidence that the State procured the

presentment in light of the nature of grand jury proceedings. *See* Tenn. R. Crim. P. 6(k). We are, therefore, constrained to our holding.

The other issues before this court, including whether the State acted in bad faith, are rendered moot by our holding.

III. Conclusion

Based on the foregoing reasoning and authorities, we conclude that Rule 5(e) of the Tennessee Rules of Criminal Procedure does not allow for the dismissal of a presentment. We reverse the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE